

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION**

CATHY KAHN MCSWEENEY (f/k/a  
Cathy Kahn Slechta); JARROD  
CHARLES SLECHTA; and ADAM  
KAHN SLECHTA, AMANDA GAIL  
SLECHTA, JORDAN TURC  
SLECHTA, and ANNA MARIE  
MCSWEENEY, all minors, by and  
through CATHY KAHN  
MCSWEENEY, as their Next Friend and  
Natural Guardian,

Plaintiffs,

v.

ROGER F. KAHN; ELLIOTT COHEN,  
Individually and as Co-Trustee of the  
CKS Irrevocable Trust; and COHEN  
POLLOCK MERLIN AXELROD &  
SMALL, P.C. a Georgia professional  
corporation (f/k/a COHEN POLLOCK  
MERLIN AXELROD &  
TANENBAUM, P.C.),

Defendants.

CIVIL ACTION NO.  
4:05-CV-132-HLM

Conference is requested

**PROPOSED CONSOLIDATED PRETRIAL ORDER**

1.

**There are no motions or other matters pending for consideration by the court except as noted:**

Plaintiffs: None, except that the Plaintiffs are filing a Daubert motion contemporaneously with the filing of this pre-trial order for the purpose of excluding expert testimony from James Walsh. Plaintiffs will file motions in limine seven days prior to trial, as specified in the Court's November 15, 2007 Order.

Defendant: Currently, no motions are pending for consideration by the court. However, Mr. Kahn will be filing a motion to exclude the expert testimony of Henry J. Wise in accordance with the Federal Rules of Civil Procedure. Additionally, Mr. Kahn will be filing motions in limine and any trial briefs no later than seven (7) days before the trial is scheduled to begin in accordance with the Court's November 15, 2007 Order.

2.

**All discovery has been completed, unless otherwise noted, and the court will not consider any further motions to compel discovery. (Refer to LR 37.1B). Provided there is no resulting delay in readiness for trial, the parties shall, however, be permitted to take the depositions of any persons for the preservation of evidence and for use at trial.**

Plaintiffs: Plaintiffs maintain that discovery is completed and that it is improper for Defendant to attempt to interject discovery issues into this pre-trial order that were not made by motion within the time provide for by L.R. 37.1.B.

Defendant: Mr. Kahn has requested supplementation of Plaintiffs' discovery responses pursuant to Federal Rule of Civil Procedure 26(c)(2) and Local Rule 26.1(c). Plaintiffs have agreed only to supplement in part. Mr. Kahn reserves the right to raise this issue in the event the parties cannot agree on the issue of supplementation of discovery responses.

Additionally, Mr. Kahn has requested that Plaintiff Children produce the printouts of any websites that they have created or assisted in creating. Not only have Plaintiff Children refused to produce such documents, but after Plaintiff Children received Mr. Kahn's request for documents, they changed their websites and shielded them from public view. Mr. Kahn reserves the right to raise the issue of document production and spoliation of evidence if the parties cannot agree on this issue prior to trial.

**3.**

**Unless otherwise noted, the names of the parties as shown in the caption to this Order and the capacity in which they appear are correct and complete, and there is no question by any party as to the misjoinder or non-joinder of any parties.**

Cathy Kahn McSweeney is now known as Cathy Kahn Duke. Roger F. Kahn is the only remaining Defendant in this case.

4.

**Unless otherwise noted, there is no question as to the jurisdiction of the court; jurisdiction is based upon the following code sections. (When there are multiple claims, list each claim and its jurisdictional basis separately.)**

Count I: Breach of Fiduciary Duty: Jurisdiction based on diversity of citizenship and amount in controversy in excess of \$75,000. (28 U.S.C. § 1332).

Count II: Breach of Fiduciary Duty (Confidential Relationship): Jurisdiction based on diversity of citizenship and amount in controversy in excess of \$75,000. (28 U.S.C. § 1332).

Count IV: Fraud: Jurisdiction based on diversity of citizenship and amount in controversy in excess of \$75,000. (28 U.S.C. § 1332).

Count V: Civil Conspiracy: Jurisdiction based on diversity of citizenship and amount in controversy in excess of \$75,000. (28 U.S.C. § 1332).

Count VI: Unjust Enrichment: Jurisdiction based on diversity of citizenship and amount in controversy in excess of \$75,000. (28 U.S.C. § 1332).

Count VII: Conversion: Jurisdiction based on diversity of citizenship and amount in controversy in excess of \$75,000. (28 U.S.C. § 1332).

Count XI: Accounting: Jurisdiction based on diversity of citizenship and amount in controversy in excess of \$75,000. (28 U.S.C. § 1332).

Count XII: Punitive Damages: Jurisdiction based on diversity of citizenship and amount in controversy in excess of \$75,000. (28 U.S.C. § 1332).

Count XIII: Attorneys' Fees: Jurisdiction based on diversity of citizenship and amount in controversy in excess of \$75,000. (28 U.S.C. § 1332).

\* Counts III, VIII, IX, and X were asserted exclusively against Defendants that are no longer parties to this lawsuit. Accordingly, evidence with respect to these Counts will not be presented at trial.

**5.**

**The following individually-named attorneys are hereby designated as lead counsel for the parties:**

**Plaintiffs:** Charles T. Huddleston, Esq.  
Arnall Golden Gregory, LLP  
171 17<sup>th</sup> Street, N.W., Suite 2100  
Atlanta, Georgia 30363  
(404) 873-8674  
(404) 873-8675 (Facsimile)

**Defendant:** William M. Droze, Esq.  
Georgia Bar No. 231039  
Troutman Sanders, LLP  
600 Peachtree Street, N.E.  
Suite 5200, Bank of America Plaza  
Atlanta, Georgia 30308  
(404) 885-3000  
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Additional Counsel: Troutman Sanders LLP  
Daniel S. Reinhardt  
Georgia Bar No. 600350  
Steven J. Hewitson

Georgia Bar No. 350398  
Anne P. Caiola  
Georgia Bar No. 142639

Brinson, Askew, Berry, Seigler, Richardson  
& Davis, LLP  
Robert M. Brinson  
Georgia Bar No. 082900  
A. Franklin Beacham, III  
Georgia Bar No. 043743  
P.O. Box 5513  
Rome, Georgia 30162-5513  
(706) 291-8853  
(706) 234-3574 (fax)

**6.**

**Normally, the plaintiff is entitled to open and close arguments to the jury. (Refer to LR39.3(B)(2)(b)). State below the reasons, if any, why the plaintiff should not be permitted to open arguments to the jury.**

There is no reason why Plaintiffs should not be permitted to open and close arguments to the jury. Plaintiffs will open and close arguments to the jury.

**7.**

**The captioned case shall be tried (X) to a jury or (\_\_\_\_) to the court without a jury, or (\_\_\_\_) the right to trial by jury is disputed.**

**8.**

**State whether the parties request that the trial to a jury be bifurcated, i.e., that the same jury consider separately issues such as liability and damages. State briefly the reasons why trial should or should not be bifurcated.**

**Plaintiffs:**

Plaintiffs do not wish the trial to a jury to be bifurcated. Under Fed. R. Civ. P. 42(b), “bifurcation of issues for trial is not routinely ordered.” Brown v. Advantage Engineering, 732 F. Supp. 1163, 1170 (N.D. Ga. 1990). Further, the District Court is to consider various factors in deciding whether to bifurcate pursuant to Fed. R. Civ. P. 42(b): (1) Convenience; (2) Prejudice; (3) Expedition; and (4) Economy; (5) Whether the issues sought to be tried separately are significantly different; (6) Whether they are triable by a jury or the court; (7) Whether discovery has been directed to a single trial of all issues; (8) Whether the evidence required for each issue is significantly different; (9) Whether one party would gain some unfair advantage from separate trials; (10) Whether a single trial of all issues would create the potential for jury bias or confusion; and (11) Whether bifurcation would enhance or reduce the possibility of pretrial settlement. See Kimberly Clark Corp. v. James River Corp., 131 F.R.D. 607, 609 (N.D. Ga. 1989). An analysis of each of these factors in this case militates against bifurcation of the trial.

To the extent the Court deems bifurcation appropriate, Defendant’s request for a limitation on net worth evidence made as part of this pre-trial order should be denied. As this Court has previously recognized, Defendant Kahn’s net worth

information is relevant to Plaintiffs' fraud claims. See September 18, 2006 Order, Doc. No. 163, pp. 49-50. Therefore, some or all of Defendant Kahn's net worth information will be tendered by Plaintiffs as part of their case.

**Defendant:**

Mr. Kahn seeks bifurcation of the trial relative to Plaintiffs' claim for punitive damages. Under Georgia law, a jury does not consider a punitive damage award amount, and evidence related thereto, until after it first determines that the defendant is liable for punitive damages. See O.C.G.A. § 51-5-5.1(d); Webster v. Boyett, 269 Ga. 191, 192 (1998) ("O.C.G.A. § 51-15-5.1(d)(1) expressly requires a bifurcation of the punitive damages issues."). After the jury first determines punitive damages are warranted, "the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case." O.C.G.A. § 51-12-5.1(d)(2). This bifurcation procedure ensures evidence the jury is likely to use for improper and impermissible purposes is admitted only where required and necessary.

The Plaintiffs seek an award of punitive damages, alleging that Mr. Kahn engaged in conduct sufficient to support such damages. Plaintiffs further allege Mr. Kahn undertook certain actions with specific intent to harm Plaintiffs, thereby



seeking to avoid O.C.G.A. § 51-12-5.1(f)'s \$250,000.00 punitive damages cap. To support the punitive damage claim, Plaintiffs attempt to introduce evidence of Mr. Kahn's net worth and evidence showing Mr. Kahn's purported specific intent to harm Plaintiffs. Such evidence is highly prejudicial and is not admissible during the liability phase of trial. Therefore, the Court should bifurcate the damage portion of the punitive damage claim, and allow Plaintiffs to introduce net worth evidence and evidence tending to show Mr. Kahn acted with specific intent to harm them only **after** the jury has determined punitive damages are warranted, if the jury even makes such a determination.

***A. Georgia Law Requires Bifurcation.***

Under Georgia law, a jury does not consider a punitive damage award amount, and evidence related thereto, until after it first determines that the defendant is liable for punitive damages. See O.C.G.A. § 51-5-5.1(d); Webster v. Boyett, 269 Ga. 191, 192 (1998) ("O.C.G.A. § 51-15-5.1(d)(1) expressly requires a bifurcation of the punitive damages issues."). After the jury first determines punitive damages are warranted, "the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case." O.C.G.A. § 51-12-5.1(d)(2). This bifurcation

procedure ensures evidence the jury is likely to use for improper and impermissible purposes is admitted only where required and necessary.

Such evidence includes Mr. Kahn's net worth, which is otherwise irrelevant and highly prejudicial. See State Farm Fire & Cas. Co. v. Woods, 896 F. Supp. 658, 660 (E.D. Tex. 1995) (noting that while evidence of financial status is relevant to determining an award of punitive damages, the same evidence is "severely prejud[icial]" to a defendant in the liability and actual damage phase of the trial). Evidence related to Mr. Kahn's purported specific intent to harm Plaintiffs is also irrelevant, unless and until the jury determines that Mr. Kahn is liable for punitive damages. This type of evidence is unnecessary and not helpful to the jury's liability determination. Moreover, this evidence is highly likely to improperly influence both the jury's liability finding and its compensatory damage award; therefore, the evidence is better reserved until after the jury determines liability for punitive damages. See Holman v. Burgess, 199 Ga. App. 61, 63 (1991) (stating that evidence of net worth may be admissible **after** a jury has determined punitive damages are warranted).

***B. Georgia's Bifurcation Requirement Controls.***

Federal Courts sitting in diversity must apply state law to substantive issues. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). O.C.G.A. § 51-15-5.1

provides defendants in Georgia the substantive guaranty that juries will not consider their net worth, or evidence of their acting with specific intent to harm, in determining liability for compensatory and punitive damages. Preventing juries from hearing this evidence is “fundamental to the resolution of punitive damages” issues under Georgia law. See Wilson v. Gillis Advert. Co., 145 F.R.D. 578 (N.D. Ala. 1993) (finding that Alabama’s rule forbidding discovery of net worth until after a jury decides punitive damages are warranted is fundamentally substantive in nature).

Moreover, the Georgia legislature has made it clear that this type of inflammatory evidence is not part of the *prima facie* case, but rather is better reserved for consideration after the jury determines liability for punitive damages. Indeed, a very element of Georgia’s punitive damage statute is the requirement of delay in presenting support for a punitive damage monetary award. See Holman, 199 Ga. App. 61 (discussing Georgia’s enactment of the 1987 Tort Reform Act, which established the defendant’s right not to be confronted with evidence of punitive damages until liability for the same has been established). See also Boyette v. Am. Int’l Adjustment Co., No. 1:90-CV-875-WCO, 1994 U.S. Dist. LEXIS 4594 at \*36 (N.D. Ga. March 31, 1994) (recognizing that Erie may require the application of Georgia’s bifurcation procedure in diversity cases). Because the

Georgia law that prohibits consideration of this evidence during the liability phase of trial is substantive under Erie, the Court should apply O.C.G.A. § 51-15-5.1 and bifurcate the punitive damages award portion of the trial.

However, if the Court finds that the bifurcation requirement is procedural in nature, it should nevertheless bifurcate the trial because there is no federal rule expressly governing this issue. The United States Supreme Court instructed that pursuant to the Rules Enabling Act, when a federal rule governing the procedural issue exists, the federal rule will control so long as it is constitutional. Hanna v. Plummer, 380 U.S. 460 (1965). Here, however, there is no federal rule requiring a district court to admit evidence related to net worth and specific intent to harm during the liability phase of trial. The Georgia requirement mandating exclusion of such evidence until the punitive monetary award phase is not inconsistent with Rule 42(b), which permits a federal court to bifurcate a trial to avoid prejudice; rather, the rules can be read together, without conflict, to exclude evidence of punitive damages until the appropriate phase of trial. Thus, the Rules Enabling Act does not operate to supersede Georgia's punitive damage proof procedures under Hanna.

Where the Federal Rules of Civil Procedure do not supplant a state procedural law under Hanna, the Supreme Court has held that the district court

must balance the competing state and federal interests under Byrd v. Blue Ridge Rural Elec. Coop. Inc., 356 U.S. 525 (1958). The district court must weigh the state's interest in having the federal court uphold its substantive laws against the federal court's interests, while considering the likelihood of forum shopping. Id. at 536-40. If the state's interests outweigh the federal court's interests, the district court should apply the state substantive law. Id. Here, Georgia has expressed the importance of protecting a defendant's due process rights by precluding plaintiffs from using inflammatory evidence at improper points during trial. Georgia courts expressly uphold the bifurcation process, recognizing the legislature's efforts to ensure fair and just trial results. Moreover, the federal interest here is minimal, as Plaintiffs' allegations arise solely under state law, and the Federal Rules of Civil Procedure expressly grant district courts authority to bifurcate trials in the manner Mr. Kahn suggests. See Fed.R.Civ.P. 42(b).

Finally, to hold otherwise is likely to encourage forum shopping. Plaintiffs seeking to prejudice the jury by introducing such evidence during the liability phase of a trial will find creative ways to bring claims in federal court, thereby avoiding the protections afforded by Georgia's laws to defendants facing a punitive damages claim.

In sum, Georgia's bifurcation requirement is substantive in nature, and therefore Erie requires this Court to apply Georgia law. However, even if found to be procedural in nature, because a Federal Rule of Civil Procedure does not expressly govern the issue, the Court should apply Georgia's bifurcation requirement because Georgia's interest substantially outweighs any federal interest involved. Finally, this result eliminates any risk of forum shopping, because plaintiffs are held to the same standard whether in state or federal court.

***C. Rule 42(b) Permits Bifurcation of the Punitive Damages Issue.***

To the extent Erie and its progeny do not require express application of Georgia's punitive damages procedures, the Court should nevertheless bifurcate the punitive damage award aspect of this case pursuant to Rule 42(b), which provides that a "court, in the furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim." Fed.R.Civ.P. 42(b).

Here, the Court should use its discretion under Rule 42(b) to preclude Plaintiffs from introducing evidence during the liability phase that would be prejudicial to Mr. Kahn. As the Second Circuit has stated:

Since it often would be prejudicial to a defendant to attempt to litigate its financial condition during the trial on the issues of liability and compensatory damages, the preferred method of accommodating the various interest is to delay trial as to the amount of an award of

punitive damages until the usual issues of liability and compensatory damages have been tried, along with the matter of whether the defendant's conduct warrants any award of punitive damages at all.

Smith v. Lightning Bolt Prods., 861 F.2d 363, 373-74 (2d Cir. 1988). See also Cain v. Pittsburgh Corning Corp., No. 90-16668, 1992 U.S. App. LEXIS 8568 at \*3-4 (9th Cir. April 20, 2002) ("The most common reason for bifurcating is to exclude evidence of the defendant's wealth or net worth from the compensatory damages phase."); North Dakota Fair Housing Council, Inc. v. Allen, 298 F. Supp. 2d 897, 899 (D.N.D. 2004) ("The Court agrees with the concept that evidence of the defendants' financial condition and net worth would not be presented to the jury during the first phase of the trial on liability and compensatory damages. Evidence of the defendants' net worth, although relevant to issues concerning the claim for punitive damages, can have an adverse effect on jury deliberations concerning liability and compensatory damages.").

The likelihood of substantial prejudice to Mr. Kahn is great should the jury be allowed to consider his financial worth in determining whether to compensate the Plaintiffs for alleged legal wrongs; the jury will be tempted to compromise Mr. Kahn's defenses upon learning of his personal financial circumstances, especially given the relative difference between the net worth of Mr. Kahn and that of Plaintiffs. Indeed, Plaintiffs have foreshadowed their plan to highlight at trial Mr.

Kahn's wealth versus Plaintiffs' relative lack thereof. See, e.g., Plaintiff's Motion to Compel Tax Returns and related briefing [Docs. 100 at 7, 10; 150 at 3].

Further, presenting evidence of Mr. Kahn's net worth will necessarily burden the pace of trial. Evidence offered by both sides will be voluminous, and likely will direct attention away from the central legal issues in the case. This is the very situation Rule 42(b) contemplates. The Plaintiffs indeed may have the right to present evidence of Mr. Kahn's net worth and his purported attempts to specifically harm Plaintiffs, yet not until they have succeeded in showing they are entitled to punitive damages. This result ensures the jury does not consider improper evidence during the liability phase, but provides to Plaintiffs the opportunity to timely offer relevant evidence to support their punitive damage prayer.

**9.**

**Attached hereto as Attachment "A" and made a part of this order by reference are the questions which the parties request that the court propound to the jurors concerning their legal qualifications to serve.**

See Attachment "A".

**10.**

**Attached hereto as Attachment "B-1" are the general questions which plaintiff wishes to be propounded to the jurors on voir dire examination.**

See Attachment "B-1".



**Attached hereto as Attachment “B-2” are the general questions which defendant wishes to be propounded to the jurors on voir dire examination.**

See Attachment “B-2”.

**Attached hereto as Attachment “B-3”, “B-4”, etc. are the general questions which the remaining parties, if any, wish to be propounded to the jurors on voir dire examination.**

Not applicable.

**The court, shall question the prospective jurors as to their address and occupation and as to the occupation of a spouse, if any. Counsel may be permitted to ask follow-up questions on these matters. It shall not, therefore, be necessary for counsel to submit questions regarding these matters. The determination of whether the judge or counsel will propound general voir dire questions is a matter of courtroom policy which shall be established by each judge.**

**11.**

**State any objections to plaintiff’s voir dire questions:**

Mr. Kahn objects to the following proposed voir dire questions by Plaintiffs as duplicative, not supported by the evidence and prejudicial: 28; 29; 30; 31; 32; 33; 34; 37; 38; 41; 43; 44; 45; 46; 47; 51; 52; 56; 60; 62; and 65.

**State any objections to defendant’s voir dire questions:**

None.

**12.**

**All civil cases to be tried wholly or in part by jury shall be tried before a jury consisting of not less than six (6) members, unless the parties stipulate**

**otherwise. The parties must state in the space provided below the basis for any requests for additional strikes. Unless otherwise directed herein, each side as a group will be allowed the number of peremptory challenges as provided by 28 U.S.C. § 1870. See Fed.R.Civ.P. 47(b).**

Plaintiffs are unaware at this time of any need to request additional strikes.

Mr. Kahn reserves the right to review the venire prior to determination of any final strikes.

**13.**

**State whether there is any pending related litigation. Describe briefly, including style and civil action number.**

None.

**14.**

**Attached hereto as Attachment “C” is plaintiff’s outline of the case which includes a succinct factual summary of plaintiff’s cause of action and which shall be neither argumentative nor recite evidence. All relevant rules, regulations, statutes, ordinances, and illustrative case law creating a specific legal duty relied upon by plaintiff shall be listed under a separate heading. In negligence cases, each and every act of negligence relied upon shall be separately listed. For each item of damage claimed, plaintiff shall separately provide the following information: (a) a brief description of the item claimed, for example, pain and suffering; (b) the dollar amount claimed; and (c) a citation to the law, rule, regulation, or any decision authorizing a recovery for that particular item of damage. Items of damage not identified in this manner shall not be recoverable.**

See Attachment “C”.

**15.**

**Attached hereto as Attachment “D” is the defendant’s outline of the case which includes a succinct factual summary of all general, special, and affirmative defenses relied upon and which shall be neither argumentative nor recite evidence. All relevant rules, regulations, statutes, ordinances, and illustrative case law relied upon as creating a defense shall be listed under a separate heading. For any counterclaim, the defendant shall separately provide the following information for each item of damage claimed: (a) a brief description of the item claimed; (b) the dollar amount claimed; and (c) a citation to the law, rule, regulation, or any decision authorizing a recovery for that particular item of damage. Items of damage not identified in this manner shall not be recoverable.**

See Attachment “D”.

**16.**

**Attached hereto as Attachment “E” are the facts stipulated by the parties. No further evidence will be required as to the facts contained in the stipulation and the stipulation may be read into evidence at the beginning of the trial or at such other time as is appropriate in the trial of the case. It is the duty of counsel to cooperate fully with each other to identify all undisputed facts. A refusal to do so may result in the imposition of sanctions upon the non-cooperating counsel.**

See Attachment “E”.

**17.**

**The legal issues to be tried are as follows:**

**Plaintiffs:**

- (1) Whether Defendant Roger Kahn breached his fiduciary duty to Plaintiffs as beneficiaries of the Max Kahn Estate and the MEK Irrevocable Trust.

- (2) Whether Defendant Roger Kahn breached his fiduciary duty to Plaintiff Kathy Kan Duke as a person with whom he shared a confidential relationship.
- (3) Whether Defendant committed a fraud on Plaintiff Cathy Kahn Duke by misrepresenting or otherwise concealing material facts upon which Plaintiff Cathy Kahn Duke relied to her detriment.
- (4) Whether Defendant Roger Kahn formed and engaged in a civil conspiracy to Plaintiffs' detriment.
- (5) Whether Defendant Roger Kahn was unjustly enriched to the detriment of Plaintiffs.
- (6) Whether Defendant Roger Kahn converted the assets and property of Plaintiffs to his own use and to the detriment of Plaintiffs.
- (7) Whether Defendant Roger Kahn should account to Plaintiffs for (i) money and property removed from the CKS Trust, and (ii) Plaintiffs money and property that Defendant Roger Kahn put to his own use.
- (8) Whether a constructive trust should be imposed on all money and property taken from Plaintiffs by Defendant Roger Kahn, including but not limited to Plaintiffs' interest in Swallow Hopkins and whether the Swallow Hopkins interest (which is still generating cash distributions) should be returned to Plaintiffs.
- (9) Whether Plaintiffs are entitled to an award of punitive damages from Defendant Roger Kahn.
- (10) Whether Defendant Kahn acted with specific intent to harm Plaintiffs.
- (11) Whether Plaintiffs are entitled to reimbursement of their reasonable attorneys' fees and expenses.

**Defendant:**

1. Whether Plaintiffs have proven the elements of breach of fiduciary duty;
2. Whether Plaintiffs have proven the elements of fraud;
3. Whether Plaintiffs have proven the elements of unjust enrichment;
4. Whether Plaintiffs have proven the elements of civil conspiracy;
5. Whether Plaintiffs have proven the elements of conversion;
6. Whether Plaintiffs are entitled to punitive damages;
7. Whether Plaintiffs have proven that Mr. Kahn acted with a specific intent to harm Plaintiffs;
8. Whether Plaintiffs have proven that they are entitled to attorneys fees;
9. Whether Plaintiffs have proven that they are entitled to an accounting;
10. Whether some or all of the relief demanded by Plaintiffs is barred by the defense of consent;
11. Whether some or all of the relief demanded by Plaintiffs is barred by the defense of subsequent affirmation;
12. Whether some or all of the relief demanded by Plaintiffs is barred by the terms, conditions, limitations, and exclusions of the CKS Trust, the Last Will and Testament of Max E. Kahn, or the Assignment Receipt and Release Agreement;
13. Whether some or all of the relief demanded by Plaintiffs is barred by the applicable statutes of limitation or repose;
14. Whether some or all of the relief demanded by Plaintiffs is barred by the equitable defense of laches;

15. Whether some or all of the relief demanded by Plaintiffs is barred by their own conduct;
16. Whether some or all of the relief demanded by Plaintiffs is barred by the doctrine of unclean hands;
17. Whether some or all of the relief demanded by Plaintiffs is barred by the doctrine of waiver;
18. Whether some or all of the relief demanded by Plaintiffs is barred by the equitable defense of estoppel;
19. Whether some or all of the relief demanded by Plaintiffs is barred by the doctrine of judicial estoppel;
20. Whether Mr. Kahn proximately caused the damages that were allegedly sustained by Plaintiffs;
21. Whether Mr. Kahn acted in good faith and in conformity with law at all times relevant to the subjects alleged in Plaintiffs' Second Amended Complaint;
22. Whether some or all of the relief demanded by Plaintiffs is barred by actions in conformance with written contracts;
23. Whether Mr. Kahn can be held jointly and severally liable with any other defendant;
24. Whether some or all of the relief demanded by Plaintiffs is barred by the voluntary payment doctrine;
25. Whether some or all of the relief demanded by Plaintiffs is barred by the defense of payment;
26. Whether some or all of the relief demanded by Plaintiffs is barred by the defense of release;
27. Whether some or all of the relief demanded by Plaintiffs is barred by the defense of accord and satisfaction;

28. Whether Plaintiffs are precluded from recovering any equitable relief based upon the existence of an adequate legal remedy and/or the terms of written contracts;
29. Whether some or all of the relief demanded by Plaintiffs is barred by their failure to name indispensable parties to this action; and
30. Whether the imposition of punitive damages or the application of O.C.G.A. § 51-12-5.1 to Mr. Kahn is unconstitutional and in violation of the Eighth Amendment of the United States Constitution and Article I, Section I, Paragraph I of the Constitution of the State of Georgia.

**18.**

**Attached hereto as Attachment “F-1” for the plaintiff, Attachment “F-2” for the defendant, and Attachment “F-3”, etc. for all other parties is a list of all the witnesses and their addresses for each party. The list must designate the witnesses whom the party will have present at trial and those witnesses whom the party may have present at trial. Expert (any witness who might express an opinion under Rule 702), impeachment and rebuttal witnesses whose use as a witness can be reasonably anticipated must be included. Each party shall also attach to the list a reasonable specific summary of the expected testimony of each expert witness.**

**All of the other parties may rely upon a representation by a designated party that a witness will be present unless notice to the contrary is given ten (10) days prior to trial to allow the other party(s) to subpoena the witness or to obtain the witness’ testimony by other means.**

**Witnesses who are not included on the witness list (including expert, impeachment and rebuttal witnesses whose use should have been reasonably anticipated) will not be permitted to testify, unless expressly authorized by court order based upon a showing that the failure to comply was justified.**

See Attachment “F-1” and Attachment “F-2”.

**19.**

**Attached hereto as Attachment “G-1” for the plaintiff, “G-2” for the defendant, and “G3”, etc. for all other parties are the typed lists of all documentary and physical evidence that will be tendered at trial. Learned treatises which are expected to be used at trial shall not be admitted as exhibits. Counsel are required, however, to identify all such treatises under a separate heading on the party’s exhibit list. Each party’s exhibits shall be numbered serially, beginning with 1, and without the inclusion of any alphabetical or numerical subparts. Adequate space must be left on the left margin of each party’s exhibit list for court stamping purposes. A courtesy copy of each party’s list must be submitted for use by the judge.**

**Prior to trial, counsel shall mark the exhibits as numbered on the attached lists by affixing numbered yellow stickers to plaintiff’s exhibits, numbered blue stickers to defendant’s exhibits, and numbered white stickers to joint exhibits. When there are multiple plaintiffs or defendants, the surname of the particular plaintiff or defendant shall be shown above the number on the stickers for that party’s exhibits.**

**Specific objections to another party’s exhibits must be typed on a separate page and must be attached to the exhibit list of the party against whom the objections are raised.**

**Objections as to authenticity, privilege, competency, and, to the extent possible, relevancy of the exhibits shall be included. Any listed document to which an objection is not raised shall be deemed to have been stipulated as to authenticity by the parties and shall be admitted at trial without further proof of authenticity.**

**Unless otherwise noted, copies rather than originals of documentary evidence may be used at trial. Documentary or physical exhibits may not be submitted by counsel after filing of the pretrial order, except upon consent of all the parties or permission of the court. Exhibits so admitted must be numbered, inspected by counsel, and marked with stickers prior to trial.**



**Counsel shall familiarize themselves with all exhibits (and the numbering thereof) prior to trial. Counsel will not be afforded time during trial to examine exhibits that are or should have been listed.**

See Attachment "G-1" and Attachment "G-2".

**20.**

**The following designated portions of the testimony of the persons listed below may be introduced by deposition:**

The parties' designations of deposition testimony are included below. Objections to the deposition testimony designated below shall be served no later than thirty (30) days prior to the start of trial. Subject to the Court's approval, the parties have agreed that they may identify additional portions of deposition testimony for use at trial, provided that they provide such designations to the other party at least thirty (30) days prior to trial. Objections to any additional deposition testimony so designated by the parties will be due no later than seven (7) days prior to the start of trial.

**Plaintiffs:**

**Leonard Abess: September 28, 2006**

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Page	38:24	through	40:21
Page	41:03	beginning	41:10
		“Does That”	
		through	
Page	41:19	through	42:25
Page	45:02	through	57:11
Page	63:08	through	64:17
Page	65:08	through	67:12
Page	69:20	through	72:11

**George Hodges: September 15, 2006**

Page	5:7	through	7:17	
Page	9:15	through	25:9	
Page	30:24	through	32:12	
Page	38:9	through	39:23	
Page	40:7	through	41:5	Ending with “the first”
Page	42:9	through	45:5	
Page	45:10	through	45:12	
Page	45:23	beginning	46:11	Ending with “rolling option”
		“But in”		
		through		
Page	49:23	through	53:22	
Page	54:11	through	56:5	
Page	56:13	through	58:21	
Page	59:8	through	63:11	
Page	64:6	through	66:11	
Page	66:24	through	68:14	
Page	68:21	through	76:16	
Page	81:2	through	82:4	
Page	83:20	through	84:7	
Page	85:6	through	86:8	
Page	87:4	through	89:14	
Page	90:11	through	92:14	

Page	95:12	through	96:14
Page	100:16	through	102:4
Page	102:22	through	105:7
Page	106:9	through	108:10

**Jan Coleman: August 17, 2006**

Page	17:20	through	20:5	
Page	21:6	through	25:20	
Page	29:2	through	29:3	End with "Exhibit 65"
Page	29:17	through	30:14	
Page	33:8	through	37:5	
Page	47:8	through	47:15	
Page	77:10	through	79:3	
Page	123:10	through	126:20	
Page	127:15	through	129:7	
Page	130:1	through	132:5	
Page	134:1	through	137:10	
Page	138:1	through	139:9	
Page	142:8	through	146:20	
Page	148:8	through	149:1	
Page	154:1	through	166:2	
Page	168:5	through	169:2	
Page	172:8	through	174:13	

**Irving Lehrer: September 28, 2006**

Page	6:11	through	12:7
Page	12:17	through	25:20
Page	26:1	through	40:21
Page	58:1	through	59:22
Page	60:24	through	65:12

Plaintiffs reserve the right to supplement their designations based upon evidence presented at trial and for purposes of impeachment and/or rebuttal.

**Defendant:**

Mr. Kahn may introduce by deposition the following designated portions of testimony:

**Leonard Abess: September 28, 2006**

Page	6:4	through	7:23	
Page	8:2	through	10:3	
Page	12:2	through	14:4	
Page	15:8	through	15:22	
Page	17:5	through	19:8	
Page	21:17	through	22:14	
Page	23:1	through	23:20	
Page	27:12	through	28:8	
Page	31:3	through	31:18	
Page	32:15	through	35:22	
Page	37:12	through	37:22	
Page	43:25	through	44:6	
Page	44:22	through	45:1	Begins at "Do you know"
Page	46:9	through	46:25	
Page	47:8	through	47:13	
Page	47:18	through	47:20	
Page	48:7	through	48:17	
Page	48:22	through	49:1	
Page	50:2	through	50:5	
Page	56:25	through	57:2	
Page	58:7	through	58:11	
Page	61:7	through	61:10	
Page	62:7	through	62:10	
Page	63:8	through	64:20	
Page	65:17	through	67:2	
Page	67:6	through	67:15	
Page	67:17	through	67:19	
Page	68:1	through	68:19	
Page	69:9	through	69:13	
Page	73:2	through	73:8	

Page	73:10	through	74:6	Begins at “Exhibit 336”
Page	74:8	through	74:10	

**Elliott Cohen: August 29, 2006 (Vol. I) and September 18, 2006 (Vol. II)**

Page	16:12	through	17:1	
Page	17:14	through	20:10	
Page	20:24	through	22:18	
Page	24:10	through	25:2	
Page	26:2	through	26:8	
Page	29:2	through	29:25	
Page	30:12	through	30:15	
Page	31:12	through	32:6	
Page	33:3	through	33:6	
Page	34:2	through	34:18	
Page	35:10	through	35:17	
Page	44:2	through	44:8	Ends with “present themselves”
Page	45:2	through	46:21	
Page	51:1	through	51:1	Ends with “Exhibit 121”
Page	51:18	through	52:3	
Page	52:23	through	53:4	
Page	54:4	through	54:9	
Page	58:9	through	59:18	
Page	63:7	through	63:15	
Page	63:24	through	64:10	
Page	65:22	through	66:11	
Page	68:10	through	68:14	
Page	69:1	through	69:5	
Page	69:17	through	69:21	
Page	70:3	through	70:8	
Page	70:12	through	71:2	
Page	71:20	through	71:23	
Page	72:2	through	72:21	
Page	73:4	through	73:16	
Page	74:12	through	74:21	
Page	75:3	through	75:18	
Page	75:22	through	76:6	

Page	76:14	through	77:13	Begins at “If”
Page	79:10	through	79:19	
Page	83:15	through	83:25	
Page	84:22	through	85:4	
Page	85:9	through	85:17	
Page	88:3	through	88:21	
Page	89:17	through	90:2	
Page	98:8	through	98:10	
Page	98:22	through	98:22	
Page	99:17	through	100:4	
Page	100:13	through	101:7	
Page	103:19	through	104:9	
Page	105:19	through	106:6	
Page	107:2	through	107:22	
Page	108:4	through	108:14	
Page	110:9	through	110:20	
Page	114:14	through	116:18	
Page	117:12	through	117:13	
Page	121:22	through	123:15	
Page	129:22	through	130:13	
Page	131:12	through	131:16	
Page	132:17	through	132:25	
Page	133:4	through	133:10	
Page	133:25	through	134:4	
Page	134:9	through	134:11	
Page	134:15	through	134:18	
Page	135:5	through	135:15	
Page	136:5	through	136:16	
Page	136:20	through	137:10	
Page	139:15	through	139:17	Ends with “McSweeney”
Page	139:25	through	140:4	

*Volume II*

Page	191:18	through	191:23
Page	203:15	through	204:2
Page	212:10	through	212:11
Page	212:20	through	212:21

Page	214:19	through	215:23	
Page	216:23	through	216:25	
Page	220:6	through	220:13	
Page	220:24	through	221:25	
Page	234:14	through	235:2	
Page	235:6	through	235:9	
Page	242:24	through	243:7	
Page	243:22	through	244:11	
Page	247:21	through	247:23	
Page	247:25	through	247:25	
Page	261:3	through	261:24	
Page	267:20	through	268:12	
Page	276:1	through	276:3	
Page	276:5	through	276:5	
Page	270:9	through	270:23	
Page	272:18	through	272:19	Ends with "Exhibit 111"
Page	273:4	through	273:15	
Page	275:19	through	275:25	

**Jan Coleman: August 17, 2006**

Page	18:21	through	19:6	
Page	20:9	through	20:13	
Page	21:6	through	22:14	
Page	24:19	through	25:20	
Page	26:4	through	27:16	
Page	33:8	through	34:5	
Page	34:18	through	35:8	
Page	36:5	through	36:17	
Page	38:3	through	39:14	
Page	40:4	through	42:15	Begins at "And do you"
Page	43:1	through	44:7	
Page	47:8	through	47:15	
Page	53:1	through	54:5	
Page	54:8	through	55:2	
Page	55:4	through	55:7	
Page	55:10	through	55:10	

Page	69:6	through	71:7	
Page	71:21	through	72:1	
Page	72:5	through	72:9	
Page	79:15	through	80:21	
Page	83:14	through	84:14	
Page	85:20	through	87:8	
Page	87:12	through	88:2	
Page	92:8	through	93:1	
Page	94:15	through	95:4	
Page	97:4	through	97:7	
Page	97:9	through	97:12	
Page	97:17	through	97:21	
Page	98:16	through	99:12	
Page	102:5	through	102:18	
Page	103:11	through	104:9	
Page	116:9	through	116:15	
Page	117:10	through	119:2	
Page	120:16	through	122:3	
Page	125:17	through	126:6	
Page	134:21	through	135:9	
Page	137:14	through	139:7	
Page	147:13	through	147:17	
Page	148:9	through	148:19	
Page	151:3	through	151:9	
Page	152:7	through	152:9	
Page	152:11	through	152:16	
Page	156:2	through	157:15	
Page	162:14	through	163:16	
Page	170:9	through	172:7	Begins at "Do you recall"
Page	175:13	through	175:18	

**Larry Coleman: August 17, 2006**

Page	8:15	through	10:17
Page	12:6:	through	12:11
Page	18:2	through	20:4
Page	23:19	through	25:11



Page	25:13	through	27:7
Page	29:1	through	29:10
Page	29:14	through	30:1
Page	31:6	through	33:5
Page	36:11	through	37:1
Page	40:2	through	40:12
Page	44:14	through	45:11
Page	71:9	through	72:3
Page	74:3	through	74:18
Page	74:20	through	75:10
Page	81:21	through	82:11

**George Hodges: September 15, 2006**

Page	5:7	through	7:6
Page	7:12	through	18:6
Page	20:10	through	30:23
Page	31:13	through	40:5
Page	40:25	through	45:9
Page	45:13	through	45:25
Page	46:14	through	47:10
Page	49:23	through	51:5
Page	55:24	through	56:5
Page	66:12	through	66:16
Page	78:18	through	79:8
Page	80:20	through	81:1
Page	82:13	through	82:21
Page	83:16	through	83:19
Page	86:9	through	86:13
Page	87:11	through	89:21
Page	92:15	through	93:10
Page	93:12	through	93:17
Page	93:19	through	93:23
Page	97:7	through	97:17
Page	97:25	through	98:7
Page	98:13	through	98:13
Page	98:21	through	99:2
Page	102:5	through	102:16

Page 108:17 through 108:20  
 Page 108:22 through 108:25

**Alex Howard: September 26, 2006**

Page 4:3 through 13:6  
 Page 13:19 through 15:20  
 Page 16:17 through 17:6  
 Page 19:10 through 20:8  
 Page 20:13 through 22:16  
 Page 23:2 through 23:5  
 Page 24:15 through 24:21  
 Page 24:23 through 24:23 Ends with “yes.”  
 Page 26:6 through 28:7  
 Page 28:17 through 29:21  
 Page 30:3 through 31:3 Begins at “And where”  
 Page 38:5 through 38:24  
 Page 47:8 through 47:13  
 Page 48:18 through 49:17  
 Page 53:10 through 53:20

**Irving J. Lehrer: September 28, 2006**

Page 6:12 through 6:18  
 Page 6:23 through 10:7  
 Page 10:25 through 11:7  
 Page 12:17 through 14:9  
 Page 14:23 through 14:25  
 Page 15:6 through 15:14  
 Page 17:10 through 18:2  
 Page 18:13 through 18:19  
 Page 19:2 through 20:6  
 Page 21:7 through 23:22  
 Page 25:10 through 25:16  
 Page 29:15 through 30:5  
 Page 31:13 through 32:13

Page	32:21	through	33:16	
Page	34:15	through	34:21	
Page	40:13	through	40:21	
Page	44:2	through	48:5	
Page	48:7	through	48:12	
Page	49:3	through	49:14	
Page	49:20	through	49:23	Begins at "It would not"
Page	49:25	through	50:3	
Page	50:5	through	50:11	
Page	50:13	through	52:4	
Page	52:6	through	52:6	
Page	55:10	through	55:25	
Page	58:5	through	59:22	
Page	61:17	through	61:21	
Page	70:3	through	70:14	
Page	71:8	through	73:19	
Page	73:23	through	74:11	
Page	74:13	through	77:18	
Page	78:1	through	81:8	
Page	81:23	through	82:6	

**Viola Slechta: November 17, 2006**

Page	9:7	through	10:5	Begins at: "Do you know Cathy McSweeney"
Page	14:9	through	15:4	
Page	20:21	through	21:11	
Page	23:3	through	25:2	
Page	33:10	through	35:10	
Page	38:21	through	41:20	
Page	77:17	through	78:11	Begins at: "We talked a little about"

Mr. Kahn reserves the right to supplement his designations based upon evidence presented at trial and for purposes of impeachment and/or rebuttal.

**Any objections to the depositions of the foregoing persons or to any questions or answers in the depositions shall be filed in writing no later than the day the case is first scheduled for trial. Objections not perfected in this manner will be deemed waived or abandoned. All depositions shall be reviewed by counsel and all extraneous and unnecessary matter, including non-essential colloquy of counsel, shall be deleted. Depositions, whether preserved by stenographic means or videotape, shall not go out with the jury.**

**21.**

**Attached hereto as Attachments “H-1” for the plaintiff, “H-2” for the defendant, and “H-3”, etc. for other parties, are any trial briefs which counsel may wish to file containing citations to legal authority concerning evidentiary questions and any other legal issues which counsel anticipate will arise during the trial of the case. Limitations, if any, regarding the format and length of trial briefs is a matter of individual practice which shall be established by each judge.**

Plaintiffs:

At this time, Plaintiffs do not intend to submit trial briefs, although they reserve the opportunity to do so should an issue arise at the pre-trial conference that requires briefing. Plaintiffs will address evidentiary issues through motions *in limine* submitted seven days prior to trial in accordance with the court’s November 15, 2007 Order.

Defendants:

Mr. Kahn will file any trial briefs relative to the issues presented to the Court at the time of the filing of his motions in *limine* unless the Court otherwise directs. Mr. Kahn hereby incorporates by reference as if attached hereto as Attachment H-

2, all briefs filed by Mr. Kahn in support of his motions for summary judgment and in opposition to Plaintiffs' motions for summary judgment. *See* Doc. Nos. 21, 38, 85, 119, 248 and 311.

**22.**

**In the event this is a case designated for trial to the court with a jury, requests for charge must be submitted no later than 9:30 a.m. on the date on which the case is calendared (or specially set) for trial. Requests which are not timely filed and which are not otherwise in compliance with LR 51.1, will not be considered. In addition, each party should attach to the requests to charge a short (not more than one (1) page) statement of that party's contentions, covering both claims and defenses, which the court may use in its charge to the jury.**

**Counsel are directed to refer to the latest edition of the Eleventh Circuit District Judges Association's Pattern Jury Instructions and Devitt and Blackmar's Federal Jury Practice and Instructions in preparing the requests to charge. For those issues not covered by the Pattern Instructions or Devitt and Blackmar, counsel are directed to extract the applicable legal principle (with minimum verbiage) from each cited authority.**

**23.**

**If counsel desire for the case to be submitted to the jury in a manner other than upon a general verdict, the form of submission agreed to by all counsel shall be shown in Attachment "I" to this Pretrial Order. If counsel cannot agree on a special form of submission, parties will propose their separate forms for the consideration of the court.**

See Attachment "I".

**24.**

**Unless otherwise authorized by the court, arguments in all jury cases shall be limited to one-half hour for each side. Should any party desire any**

**additional time for argument, the request should be noted (and explained) herein.**

Plaintiffs:

Given the complex legal and factual issues presented in this case, Plaintiffs request that they be permitted sixty minutes to make opening arguments and sixty minutes to make closing arguments.

Defendant:

Mr. Kahn respectfully requests that he be given ninety minutes to make his opening argument, and ninety minutes to make his closing argument. The need for this additional time is due to the multiple counts that Plaintiffs have alleged against Mr. Kahn and the extensive record that has been established throughout the course of this lengthy litigation. Specifically, the parties have collected thousands of documents and introduced more than five-hundred exhibits during twenty-seven depositions. In addition to needing time to explain these documents and testimony, Mr. Kahn will also need some time to educate the jury about the nature and complexity of trusts, and specifically the various trusts that are central to this litigation.

**25.**

**If the case is designated for trial to the court without a jury, counsel are directed to submit proposed finding of fact and conclusions of law not later than the opening of trial.**

This case is designated for trial by jury.

**26.**

**Pursuant to LR 16.3, lead counsel and persons possessing settlement authority to bind the parties met in person on December 4, 2007, to discuss in good faith the possibility of settlement of this case. The court (\_\_\_\_) has or (X) has not discussed settlement of this case with counsel. It appears at this time that there is:**

- (\_\_\_\_) A good possibility of settlement.**
- (\_\_\_\_) Some possibility of settlement.**
- (\_\_\_\_) Little possibility of settlement.**
- (X) No possibility of settlement.**

**27.**

**Unless otherwise noted, the court will not consider this case for a special setting, and it will be scheduled by the clerk in accordance with the normal practice of the court.**

Plaintiff:

Because five of the Plaintiffs are minors or are in college, the parties would prefer a special setting to assist with planning absences in advance of trial. If, however, a special setting would unduly delay the trial, the Plaintiffs would prefer to be placed on the next available trial calendar.

Defendant:

Mr. Kahn respectfully requests that the Court specially set this case for trial. Several of the witnesses who may testify reside out of the State of Georgia and will

need to make travel arrangements. Additionally, Plaintiffs Jarrod Charles Slechta and Adam Kahn Slechta, who may be called to testify, are college students who will likely need to plan for any absence from school. Finally, the anticipated length of this trial also makes it appropriate for a special setting.

**28.**

The plaintiffs estimate that it will require six days to present their evidence. The defendant estimates that it will require five days to present its evidence. It is estimated that the total trial time is twelve days.

**29.**

**IT IS HEREBY ORDERED** that the above constitutes the pretrial order for the above captioned case (X) submitted by stipulation of the parties or (\_\_\_\_) approved by the court after conference with the parties.

**IT IS FURTHER ORDERED** that the foregoing, including the attachments thereto, constitutes the pretrial order in the above case and that it supersedes the pleadings which are hereby amended to conform hereto and that this pretrial order shall not be amended except by Order of the court to prevent manifest injustice. Any attempt to reserve a right to amend or add to any part of the pretrial order after the pretrial order has been filed shall be invalid and of no effect and shall not be binding upon any party or the court, unless specifically authorized in writing by the court.

**IT IS SO ORDERED** this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

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UNITED STATES DISTRICT JUDGE



Each of the undersigned counsel for the parties hereby consents to entry of the foregoing pretrial order, which has been prepared in accordance with the form pretrial order adopted by this court.

ARNALL GOLDEN GREGORY LLP      TROUTMAN SANDERS LLP

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